UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JEAN P. SIMON, M.D.,

Plaintiff,

- against -

UNUM GROUP F/K/A UNUMPROVIDENT CORPORATION and PROVIDENT LIFE AND CASUALTY INSURANCE COMPANY,

Defendants.

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MEMORANDUM OPINION AND ORDER

07 Civ. 11426 (SAS)

SHIRA A. SCHEINDLIN, U.S.D.J.:

I. INTRODUCTION

By an Opinion and Order dated June 23, 2010 I awarded Jonathan Sack attorneys' fees and prejudgment interest against Dr. Jean P. Simon in the amount of $102,394.76.[1] Simon – an obstetrician/gynecologist – was the plaintiff in an action before this Court in which he sought residual disability payments from defendant insurance companies due to an injury that allegedly limited his ability to

[1] *See Simon v. Unum*, No. 07 Civ. 11426, 2010 WL 2541145 (S.D.N.Y. June 23, 2010).

perform professional services.[2] Sack was counsel of record for Simon in that action for approximately thirteen months until he was dismissed on October 28, 2008.[3] Following substitution of counsel and further motion practice,[4] the action was concluded with a settlement in Simon's favor.[5] Simon now moves for reconsideration of this Court's grant of attorneys' fees and prejudgment interest.

II. APPLICABLE LAW

Motions for reconsideration are governed by Local Rule 6.3 and are committed to the sound discretion of the district court.[6] A motion for reconsideration is appropriate where "the moving party can point to controlling decisions or data that the court overlooked – matters, in other words, that might

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[2] *See* 3/11/10 Stipulation of Dismissal with Prejudice.

[3] *See* 10/28/08 Notice of Substitution of Counsel.

[4] *See Simon v. Unum Group*, No. 07 Civ. 11426, 2009 WL 2596618 (S.D.N.Y. Aug. 21, 2009); *Simon v. Unum Group*, No. 07 Civ. 11426, 2009 WL 857635 (S.D.N.Y. Mar. 30, 2009).

[5] *See* 10/30/09 Order of Discontinuance. The action was subsequently dismissed with prejudice after settlement was finalized. See 3/13/10 Stipulation of Dismissal with Prejudice.

[6] *See Patterson v. United States*, No. 04 Civ. 3140, 2006 WL 2067036, at *1 (S.D.N.Y. July 26, 2006) ("The decision to grant or deny a motion for reconsideration is within the sound discretion of the district court.") (citing *McCarthy v. Manson*, 714 F.2d 234, 237 (2d Cir. 1983)).

reasonably be expected to alter the conclusion reached by the court."[7] A motion for reconsideration may also be granted to "'correct a clear error or prevent manifest injustice.'"[8]

The purpose of Local Rule 6.3 is to "'ensure the finality of decisions and to prevent the practice of a losing party examining a decision and then plugging the gaps of a lost motion with additional matters.'"[9] Local Rule 6.3 must be "narrowly construed and strictly applied so as to avoid repetitive arguments on issues that have been considered fully by the Court."[10] Courts have repeatedly been forced to warn counsel that such motions should not be made reflexively to

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[7] *In re BDC 56 LLC*, 330 F.3d 111, 123 (2d Cir. 2003) (quotation marks and citation omitted).

[8] *RST (2005) Inc. v. Research in Motion Ltd.*, No. 07 Civ. 3737, 2009 WL 274467, at *1 (S.D.N.Y. Feb. 4, 2009) (quoting *Virgin Atl. Airways, Ltd. v. National Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir. 1992)).

[9] *Grand Crossing, L.P. v. United States Underwriters Ins. Co.*, No. 03 Civ. 5429, 2008 WL 4525400, at *3 (S.D.N.Y. Oct. 6, 2008) (quoting *S.E.C. v. Ashbury Capital Partners*, No. 00 Civ. 7898, 2001 WL 604044, at *1 (S.D.N.Y. May 31, 2001)). *Accord Commerce Funding Corp. v. Comprehensive Habilitation Servs., Inc.*, 233 F.R.D. 355, 361 (S.D.N.Y. 2005) ("[A] movant may not raise on a motion for reconsideration any matter that it did not raise previously to the court on the underlying motion sought to be reconsidered.").

[10] *United States v. Treacy*, No. 08 CR 366, 2009 WL 47496, at *1 (S.D.N.Y. Jan. 8, 2009) (quotation marks omitted). *Accord Shrader v. CSX Transp. Inc.*, 70 F.3d 255, 257 (2d Cir. 1995) (holding that a court will deny the motion when the movant "seeks solely to relitigate an issue already decided").

reargue "'those issues already considered when a party does not like the way the original motion was resolved.'"[11] A motion for reconsideration is not an "opportunity for making new arguments that could have been previously advanced,"[12] nor is it a substitute for appeal.[13]

III. DISCUSSION

Simon raises three issues on this motion for reconsideration. *First*, he argues that Sack is not entitled to attorneys' fees because he did not comply with New York's letter of engagement rule – which "requires attorneys to provide all clients with a written letter of engagement explaining the scope of legal services, the fees to be charged, billing practices to be followed, and the right to arbitrate a dispute under Rules of the Chief Administrator of the Courts . . . ."[14] This issue was dealt with in the June 23 Opinion and Simon has not submitted any controlling decisions that would require this Court to vacate its determination that a failure to

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[11] *Makas v. Orlando*, No. 06 Civ. 14305, 2008 WL 2139131, at *1 (S.D.N.Y. May 19, 2008) (quoting *In re Houbigant, Inc.*, 914 F. Supp. 997, 1001 (S.D.N.Y. 1996)).

[12] *Associated Press v. United States Dep't of Defense*, 395 F. Supp. 2d 17, 19 (S.D.N.Y. 2005).

[13] *See Grand Crossing,* 2008 WL 4525400, at *3.

[14] *Seth Rubenstein, P.C. v. Ganea*, 833 N.Y. S.2d 566, 570 (2d Dep't 2007) (citing 22 NYCRR 1215.1).

comply with the letter of engagement rule "does not prevent an attorney from recovering fees in *quantum meruit* provided that the other requirements for such recovery are satisfied."[15]

The only two New York cases cited by Simon are trial court decisions that predate the appellate court decisions cited in the June 23 Opinion. The first, *Altman v. Myers*, is a New York Supreme Court case wherein the court specifically notes that it was "aware of no appellate authority on the issue of whether the failure to comply [with the letter of engagement rule] prevents recovery."[16] Since that decision, several appellate courts have held that an attorney's failure to comply with the letter of engagement rule does not bar recovery in *quantum meruit*.[17] The second, *Beech v. Lefcourt*,[18] is a New York City Civil Court case with which the Second Department Appellate Division has explicitly disagreed.[19]

Second, Simon argues that Sack is not entitled to attorneys' fees

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[15] *Simon*, 2010 WL 2541145, at *3 (citing *Miller v. Nadler*, 875 N.Y.S.2d 461, 462 (1st Dep't 2009); *Chase v. Bowen*, 853 N.Y.S.2d 819, 819 (4th Dep't 2008); *Seth Rubenstein, P.C.*, 833 N.Y.S.2d at 572).

[16] No. 05 Civ. 604401, 2006 N.Y. Misc. LEXIS 4418, at *16 (Sup. Ct. N.Y. Co. Sept. 18, 2006).

[17] *See, e.g.*, *Miller*, 875 N.Y.S.2d at 46.

[18] 820 N.Y.S.2d 841 (Civ. Ct. N.Y. Co. 2006),

[19] *Seth Rubenstein, P.C.*, 833 N.Y.S.2d at 572.

because he was discharged for cause. Simon is correct that an attorney is not entitled to legal fees if he or she is discharged for cause.[20] However, this issue was already dealt with in the July 23 Opinion[21] and Simon has not submitted "any controlling decisions or data that the court overlooked. . . ."[22] Simon has simply regurgitated several arguments that have already been considered and rejected by this Court.

Third, Simon argues that prejudgment interest on the attorneys' fees award should have been calculated from the date of settlement rather than the date of discharge. Simon cites *Klein v. Eubank* in support of that proposition.[23] I respectfully disagree with this decision – which is not controlling. "Under New York law, a lawyer's right to recover in *quantum meruit* accrues immediately upon discharge"[24] and interest is "computed from the earliest date the cause of action

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[20] *See Universal Acupuncture Pain Servs. v. Quadrino & Schwartz, P.C.*, 370 F.3d 259, 263 (2d Cir. 2004) (citing *Teichner by Teichner v. W & J Holsteins, Inc.*, 64 N.Y. 2d 977, 979 (1985)).

[21] *See Simon*, 2010 WL 2541145, at *3.

[22] *In re BDC*, 330 F.3d at 123 (quotation marks and citation omitted).

[23] 693 N.Y.S.2d 541, 541 (1st Dep't 1999).

[24] *Universal Acupuncture Pain Servs.*, 370 F.3d at 263 (citing *Cohen v. Grainger, Tesoriero & Bell*, 602 N.Y.S.2d 788, 789 (1993)) (other citations omitted).

[for attorneys' fees] existed."[25] Accordingly, interest properly accrues from the date of discharge.[26]

IV. CONCLUSION

For the reasons stated in this Opinion, Simon's motion for reconsideration is denied. The Clerk of Court is directed to close this motion (Docket No. 89).

SO ORDERED:

Shira A. Scheindlin
U.S.D.J.

Dated: July 13, 2010
New York, New York

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[25] New York Civil Practice Law and Rules § 5001.

[26] *See D'Jamoos v. Griffith*, 340 Fed. Appx. 737, 742 (2d Cir. 2009) ("Moreover, the district court's decision to award prejudgment interest at New York's statutory rate from the date on which [the attorney] was discharged was also appropriate."); *Olgetree, Deakins, Nash, Smoak & Stewart P.C. v. Albany Steel Inc.*, 663 N.Y.S.2d 313, 315-16 (3d Dep't 1997) (stating that interest on attorneys' fees recovered in *quantum meruit* should be calculated from the date of the final bill – which was the date when the law firm "completed all of its legal services for defendant").

- Appearances -

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